No. 78-1687

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

ALAN J. WHITE,

Petitioner,

vs.

OFFICE OF PERSONNEL MANAGEMENT, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE RESPONDENTS IN OPPOSITION

ALAN J. WHITE
8201 Snug Hill Lane
Potomac, Md. 20854

Petitioner,
in propria persona

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PRELIMINARY STATEMENT

The petitioner, Alan J. White, is filing this brief pursuant to Rule 24(4) in reply to the arguments first raised in the Brief for the Respondents in Opposition ("Brief in Opposition").

Congress enacted the Privacy Act of 1974, among other purposes (Pet. at 16), "to regulate the collection, maintenance, use, and dissemination of information" by government agencies. Consistent with that purpose, the petitioner

designed this litigation to challenge certain regulated practices of the United States Civil Service Commission ("CSC") associated with the collection, maintenance and use of information about him. The petitioner hoped to cause five offending evaluations of him to be removed from his application record for an administrative law judge rating -- as he told the panel of the Court of Appeals at oral argument -- so they would not be considered in connection with his rating. The petitioner was confident that he would have received a passing rating without those evaluations and, consequently, that there would be no need to initiate further litigation under the Administrative Procedure Act ("APA") to challenge the CSC's unregulated practices associated with the rating of administrative law judge applicants.

Unfortunately, the petitioner was confronted by a District Court and a Court of Appeals which were both unwilling to permit his litigation to

proceed under the relatively new remedies of the Privacy Act. The litigation delays in the trial and appellate courts permitted the CSC's administrative action on his rating application to become final during the course of appeal, so it appeared appropriate at the time to amend the Complaint (when the record would be returned to the District Court) to initiate an APA challenge of the CSC's practices associated with the rating of administrative law judge applicants. But the Court of Appeals would not allow such an amendment. Instead, it terminated the litigation holding that no lawsuit may be brought under the Privacy Act of 1974 to amend a record being used in an administrative proceeding except in conjunction with a lawsuit under the APA to challenge the final agency action in that proceeding. The Court of Appeals cited no authority for its holding, which is unique in American jurisprudence, and the respondents cite no such authority in the Brief in Opposition.

It is inevitable that an action under the Privacy Act which challenges an agency's information practices associated with an application for a civil service rating, will overlap to some extent (Pet. at 25) with an action under the APA which challenges that agency's rating practices associated with the same record. It is inevitable that some issues, but only some issues 1/, can be raised in either type of action. The petitioner challenged the information practices of the CSC in court as soon as he exhausted the time-limited administrative procedures under the Privacy Act. The fact that he initiated that judicial challenge of

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1/ For example, it is doubtful that the violations of the Privacy Act and its implementing regulations which are discussed on pages 29 through 36 of the petition would have any relevance to a challenge under the APA of the CSC's rating practices, and it is equally doubtful that questions associated with rating credit under 5 U.S.C. § 3311 for service in the armed forces have any relevance to a challenge under the Privacy Act of the CSC's information practices.

information practices while his administrative challenge of the CSC's rating practices was still pending, and the further fact that some issues could be raised in either type of challenge, are the underlying bases for the respondents' opposition to this Court's allowance of the writ, in which they characterize the petitioner's lawsuit (at 6) as "an attempt to short-circuit the normal review process".

It is most significant that the respondents focus their opposition solely on the technical procedural ground that the petitioner's lawsuit under the Privacy Act was premature because he had not exhausted his administrative remedies under the APA. Their Brief in Opposition does not address the legislative history of the Privacy Act, the findings of Congress, the purpose expressed in the statute of providing safeguards for individuals against invasions of personal privacy, or any other matter going to the merits of the reasons for allowance of the writ. It

appears, therefore, that the respondents have nothing to say in opposition to the petition on the question of whether there are "special and important reasons" (Rule 19) for allowance of the writ. And particularly since the respondents attempted to waive filing a Brief in Opposition, the petitioner respectfully suggests that they are conceding to the Court that the writ should be allowed if the petitioner can persuade the Court in this reply that there is no merit in their technical procedural argument.

REPLY ARGUMENTS

1. The petitioner's lawsuit under the Privacy Act of 1974 is not premature.

The respondents' prematurity argument is premised upon a mischaracterization of this litigation (at 9) as a "basic attack on the fairness of the process by which the Commission determined that /the petitioner/ was ineligible to be considered

for appointment as an Administrative Law Judge." 2/ They say (at 6) that if the petitioner had not sued under the Privacy Act in February 1977, he could not have sued to have the five offending evaluations removed from his application record until the final decision on his rating application was issued in April 1978. Such an argument is not germane because the petitioner did sue under the Privacy Act. And the question is whether he had a right to do so independent of his prospective future rights under the APA.

Surely, the Court of Appeals realized that the Privacy Act contains its own procedures for invoking its remedies, and that the petitioner exhausted those procedures before commencing this litigation. Indeed, the respondents concede (at 3 and 8) that the petitioner requested amendment of

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2/ As discussed in the petition at pages 9-10 and 26-37, which discussion is not refuted by the respondents, this litigation challenges certain information practices of the CSC, as distinguished from rating practices.

his application record, and his request was denied, and that the petitioner appealed the denial within the CSC, and his appeal was denied. Significantly, the respondents did not argue to the Court of Appeals that the petitioner had not exhausted his administrative remedies, and the Court of Appeals did not rely upon the doctrine of exhaustion as a ground for its decision. The doctrine is being argued in the Brief in Opposition for the first time in this litigation to attempt a retrospective justification of the Court of Appeals' decision.

This Court said with respect to that doctrine in McKart v. United States, 395 U.S. 185 (1969), at 193,

> The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. See generally 3 K. Davis, Administrative Law Treatise § 20.01 et seq. (1958 ed., 1965 Supp.); L. Jaffe, Judicial Control of Administrative Action 424-458 (1965). The doctrine provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). The doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions. Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved. /Footnote deleted./

Significantly, the respondents do not address the administrative scheme of the Privacy Act or its legislative history, the findings of Congress, the purpose expressed in the statute of providing safeguards for individuals against invasions of personal privacy, or any other matter which would explain why the petitioner should be precluded from bringing a lawsuit under the Privacy Act prior to and independent of a possible lawsuit under the APA. The petition, on the other hand, addresses all of those matters, including the fact (Pet. at 42-43) that it was the intent of the Senate Government Operations Committee to provide "speedy" rights of access and challenge:

> Where many agencies may provide a review process after a harmful decision is made with the information, this section

> anticipates special initiative by agencies to extend existing processes, or to establish new procedures to encompass requests for access and challenge at an earlier stage in the management of the information.

In other words, one of the objectives of Congress was to permit an individual to challenge information before a harmful decision is based on that information. One of the objectives was to permit an individual to challenge information before the harmful decision.

One of the "numerous exceptions" to the exhaustion doctrine permits administrative remedies to be by-passed when a statute affords a separate remedy. Leedom v. Kyne, 358 U.S. 184, 188 (1958). This exception is embodied in the APA, which provides at 5 U.S.C. § 704, in pertinent part,

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review . . . /Emphasis added/.

In other words, the APA expressly permits judicial review of the CSC's final action on the

petitioner's Privacy Act requests, since such final action is made reviewable by § 704. And the use of the conjunctive word "and" makes it clear that such review is on an equal footing with judicial review of the CSC's final action on the petitioner's rating application "for which there is no other adequate remedy in a court".

In other words, when two judicial remedies are authorized by statute, an individual who exhausts the administrative procedures for invoking one of them may proceed with that particular remedy even though some of the same issues might be raised by exhausting the administrative procedures for, and invoking, the other.

Subsection (g)(1)(A) of the Privacy Act permits individuals to bring civil actions whenever any agency determines "not to amend an individual's record in accordance with his request". The respondents concede (at 3 and 8), as indicated, that the petitioner requested

amendment of his application record 3/, and his request was denied, and that the petitioner appealed the denial within the CSC, and his appeal was denied. Accordingly, the respondents concede facts which establish that (1) the petitioner exhausted the administrative procedures for commencing litigation under Subsection (g)(1)(A) and, consequently, (2) he could proceed with litigation under that provision. The fact that the petitioner might have litigated some of the same issues under the APA does not mean that his litigation under the Privacy Act by-passed the administrative appeal of the rating action. That appeal was decided on April 14, 1978, and since that date all applicable administrative procedures under both the Privacy Act and the APA have been exhausted.

3/ Regulation 297.102(b)(5) specifically provides, in this connection, that deletion or expungement requests, among others, are requests for correction or amendment of records.

Because the two-year statute of limitations mandated by Subsection (g)(5) begins to run "from the date on which the cause of action arises", and because that date is the one on which an agency denies an appeal from its refusal to amend a record (in the case of Subsection (g)(1)(A)), it is absolutely essential that an individual be permitted to commence litigation under Subsection (g)(1)(A) immediately upon the agency's denial of the appeal. If the individual can file suit only in conjunction with judicial review of the final agency action on the matter for which the record is used, as the Court of Appeals held in this case, he might lose his right under Subsection (g)(1)(A) because the agency might not act finally on that matter within the two-year period. 4/

4/ In this case, of course, the CSC acted within the two years; but such action reduced the effective period for filing suit (based on the Court of Appeals' holding) to the seven weeks from April 14 to June 1, 1978.

While the respondents characterize the petitioner's litigation (at 6) as "an attempt to short-circuit the normal review process", the petitioner views his lawsuit as one utilizing new remedies which have been authorized by Congress and are, in his opinion, better and quicker than the old APA remedy. 5/ If an application record for a civil service rating does not meet the standard of fairness of the Privacy Act and, consequently, has to be changed, it would not be a judicious use of court time to go through the exercise of deciding whether an applicant is rated properly on the basis of that record. As the petitioner said to the Court of Appeals in his petition for rehearing,

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5/ The petitioner has not "conceded that his claim was the equivalent of one that, under an established statutory scheme of judicial review, had to be brought in conjunction with a challenge to a particular kind of final agency action", as the respondents infer at 9. The foregoing inference is too vague for further comment since the petitioner makes a number of claims in his Complaint and petition.

> /I/f it is concluded that anything should be expunged or not considered, then it would be pointless to review the record under any standard.

A court should decide whether information in a record is maintained in accordance with the standard of fairness of the Privacy Act, before the court considers whether the agency's action based on that information was arbitrary.

The respondents' prematurity argument asks this Court to hold, in substance, that the petitioner's failure to utilize the administrative procedures which would be applicable to a challenge of the CSC's rating practices "for which there is no other adequate remedy in a court", bars him from challenging the CSC's information practices on grounds which might be raised in a challenge of the rating practices. The flaw in their argument is exposed by its statement above. It's backwards! NOW, there is another adequate remedy in a court to the extent that the grounds can be raised in a challenge of the CSC's

information practices under the Privacy Act and, therefore, the APA is displaced by the Privacy Act to the extent that information practices are challenged. The Privacy Act remedies provide the newly-established method for obtaining judicial review of information practices. And with this Court's approval, they will become the "normal" review process for information practices.

This Court said in a similar situation in McKart, supra, 395 U.S., at 196,

> We are not here faced with a premature resort to the courts -- all administrative remedies are now closed to petitioner. We are asked instead to hold that petitioner's failure to utilize a particular administrative process -- an appeal -- bars him from defending a criminal prosecution on grounds which could have been raised on that appeal. We cannot agree that application of the exhaustion doctrine would be proper in the circumstances of the present case.

In other words, the exhaustion doctrine is not applicable when there is a choice of remedies and all applicable administrative procedures are exhausted, as in this case. When two judicial

remedies are authorized by statute, the problem is not one of premature resort to the courts. The problem is whether an individual who exhausts the administrative procedures for invoking one of them may proceed with that particular remedy even though some of the same issues might be raised by exhausting the administrative procedures for, and invoking, the other, or whether the individual must also invoke the other remedy.

As applied to this case, the principal issue is whether the petitioner has a right to invoke the Privacy Act without also invoking other sections of the APA 6/, or whether the respondents or the Court of Appeals could properly require him to invoke other sections of the APA. And if

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6/ See Footnote 2 of the petition. By referring to "other" sections of the APA (at 9), the respondents concede sub silentio that the principal issue is whether the petitioner has a right to choose between different remedies which are provided by the same statute, and to follow the procedure prescribed for the particular remedy selected -- and not whether the petitioner resorted to the courts prematurely.

that is the principal issue, the decision of the Court of Appeals holding that the petitioner cannot maintain his litigation solely under the Privacy Act, conflicts with Churchwell v. United States, 545 F.2d 59 (CA8, 1976), and with the decisions of this Court holding that "the party who brings a suit is master to decide what law he will rely upon", such as The Fair v. Kohler Die Co., 228 U.S. 22, 25 (1913), contrary to the respondents' contention (at 8).

2. The petitioner has suffered real harm as a result of the Court of Appeals' decision.

While the respondents assert (at 7) that the petitioner "has suffered no real harm as a result of the court of appeals' decision", their claim does not withstand scrutiny.

The petitioner frankly admitted (Pet. at 39) that his challenge of his application record for damages under Subsection (g)(1)(C), which ripened with the final rating action in April 1978, is

not barred by the two-year statute of limitations. But the petitioner did not concede, as asserted at 7, that his causes of action under Subsection (g)(1)(D) for violations of the Privacy Act, also are not barred. The petition specifically states (Pet. at 39) that they <u>are</u> barred.

The respondents say (at 7),

> /P/etitioner is not precluded from challenging "the record itself for the purpose of changing it" (Pet. 39). He surely is free to allege, in an action challenging the ineligibility determination, that the five evaluations in his application record do not accurately reflect his present abilities and should not have been considered by the Commission in determining his eligibility for appointment as an Administrative Law Judge. 7/

The Privacy Act provides important substantive rights for challenging a record which an individual

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7/ The respondents appear to be confused since the questions would seem to be whether the evaluations reflected the petitioner's abilities accurately when they were made and, if so, whether they continued to reflect his abilities when they were used. If a rerating is ordered the evaluations presumably would be used again and, therefore, a further question would arise as to whether they reflect the petitioner's present abilities.

does not have under the APA, and those rights could well be critical to the outcome of the litigation. A challenge under the APA would begin with an administrative decision which is adverse to the individual, who would then have to carry a burden of overcoming a presumption in favor of the agency by showing the agency's decision to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A challenge under Subsection (g)(1)(A), on the other hand, would begin with a clean slate, and would permit the individual to carry a lighter burden of persuading the court in a trial <u>de novo</u> (Subsection (g)(2)(A)) with respect to the merits of the challenge. These important substantive rights are denied the petitioner by the Court of Appeals' affirmance of the summary judgement for the respondents.

A challenge either under the APA or Subsection (g)(1)(A) would require an application of the

ongoing standard of fairness to the petitioner mandated by Subsection (e)(5) of the Privacy Act. But since the question under the APA would be whether the CSC acted arbitrarily, and since the CSC's action was based on the petitioner's letter of October 22, 1976, and since that letter was based on the limited information which the respondents had furnished the petitioner at that time (including the fact that the copies of four of the evaluations they had furnished him were censored), the petitioner has little expectation of success if he is required to proceed under the APA alone. The fact that the CSC withheld information from the petitioner in violation of his constitutional right would obviously work unfairly in their favor insofar as it limited the petitioner's ability to persuade them not to consider the offending evaluations. The petitioner would hopefully have a fair chance under the Privacy Act with a trial de novo, full access to his application record, and discovery.

3. The constitutionality of Subsection (k)(5) is ripe for decision.

The petitioner disagrees with the respondents (at 10) that neither the District Court nor the Court of Appeals "considered" the constitutionality of Subsection (k)(5). The petition says on page 73 that neither court "reached and addressed" that issue. Those words are an accurate factual statement and were chosen carefully since the petitioner believes, and therefore suggests, (1) that both courts considered the issue subjectively and decided to pass it along to the next court without specifically addressing it, and (2) the principal reason for the unique holding of the Court of Appeals was to cause the petitioner to bring the constitutionality of Subsection (k)(5), among other issues under the Privacy Act, to this Court for decision.

It is significant that the respondents do not argue that Subsection (k)(5) is constitutional. They say, instead (at 9-10), that the

constitutionality of Subsection (k)(5) is not appropriate for review because it is "likewise" tied to the petitioner's "basic attack on the fairness of the process by which the Commission determined that he was ineligible to be considered for appointment as an Administrative Law Judge." That statement singularly mischaracterizes this litigation; and the word "likewise" shows beyond speculation that the mischaracterization underlies the respondents' technical procedural argument that this litigation was premature because the petitioner had not exhausted his administrative remedies under the APA. EMPHATICALLY, THIS LITIGATION CHALLENGES CERTAIN INFORMATION PRACTICES OF THE CSC, AS DISTINGUISHED FROM RATING PRACTICES. 8/ Its character is discussed in the petition at page 9-10 and 26-37, which discussion is not refuted by the respondents.

8/ If the District Court finds that the petitioner's application record was not

(Footnote continued on next page.)

Since the respondents do not argue that Subsection (k)(5) is constitutional, they apparently concede that it is not constitutional. In any event, when the government unit charged with defending the constitutionality of acts of Congress (Rule 33) fails to marshal arguments supporting the constitutionality of a challenged statute, the petitioner respectfully suggests that it is

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8/ (Continued from preceeding page.)

maintained in accordance with the fairness standard of Subsection (e)(5), it is not limited by Subsection (g)(2)(A) to an order that the record be amended. The petitioner asked the District Court to order the respondents to reconsider his "rating on the basis of such corrected record" (see Brief in Opposition, at 6) on the premise that if an unfair record was maintained by them -- that is, used by them (see Subsection (a)(3)) -- the District Court has implied authority to order the record re-used after it is amended to comply with that fairness standard. And the petitioner asked the District Court to "/s/upervise the foregoing 'reconsideration' to assure that White is not treated unfairly as a result of this litigation or the events leading thereto", for the quoted reasons stated in the Complaint, and not because this suit attacks the fairness of the rating process, as claimed by the respondents.

an occasion for this Court to allow the writ challenging the act of Congress. A fortiorari, when the act is as important as the Privacy Act of 1974.

The petitioner suggests, additionally, that there is a basic inconsistency between a right to amend a record, and authority to keep part of the record secret from the person having the right of amendment. 9/ The right to amend includes an inherent right to know everything in the record both before and after amendment. Otherwise, the right would exist only as to those parts of the record which an agency is willing to disclose, and in many cases that would result in no right to amend whatsoever.

9/ This basic inconsistency is reflected in Regulation 297.117(b)(1)(iii) which exempts records from access under Subsection (d), but not from amendment.

4. Miscellaneous arguments.

It is not a fact, as claimed in the Brief in Opposition (at 3 and 8), that the letter of December 2, 1976, from the Office of ALJs to the petitioner, denied the petitioner's request of October 22, 1976, to delete the five evaluations in question from his application record. That letter replied to the petitioner's letter of August 16, 1976, which asked the Board to review the rating action of the Office of ALJs. It also discussed the petitioner's letter of October 22, 1976, requesting deletion. But it did not act on that letter, as is evident from the facts that (1) the letter of December 2, 1976, did not expressly deny the petitioner's deletion request of October 22, 1976, and (2) the letter of December 2, 1976, did not refer the petitioner for further review to the Assistant Executive Director for Freedom of Information and Privacy, as is required by Regulation 297.112(a)(2)(ii)(D) and as was done routinely in the case of denials

of Privacy Act requests. A copy of the letter is set out as an appendix to this reply brief (12a-14a) to enable the Court to resolve this factual dispute between the parties, if its resolution is material to allowing or denying the writ.

With respect to the failure of the Office of ALJs to acknowledge the petitioner's request to amend his record within ten days of its receipt, the respondents are wrong in saying (at 8) that the failure became moot on December 2, 1976, when the request was denied. Aside from the fact that the letter of December 2, 1976, did not deny that request, no subsequent action can cure the fact that the Office of ALJs did not comply with the time requirement of Subsection (d)(2)(A). Although the particular violation is not as serious as others, it is important in that it is one of a chain of violations which establish the intent or willfulness of the respondents with respect to the important procedural and substantive requirements which are discussed on

pages 29 through 36 of the petition.

While the respondents' principal argument is that the petitioner's lawsuit under the Privacy Act of 1974 was premature, they argue in the footnote on page 8 that he waited too long because there was a short period of time -- six months 10/ -- in which the petitioner could have sued under both the Privacy Act and the APA. The latter argument is not germane because the petitioner filed his lawsuit under the Privacy Act and, therefore, did not thereafter have to remain vigilant as to the statute of limitations applicable to the claims in this litigation. The

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10/ The period was seven weeks rather than six months because the earliest claim on which the petitioner sued was the solicitation violation which occurred on or about June 1, 1976. Of course, there may have been no such period whatsoever because the petitioner may have found, if he had been permitted to proceed with discovery, that events actionable under the Privacy Act occurred between January 12, 1976, which was the date on which he filed his rating application, and April 14, 1976, which was two years prior to the date of the Board's final action on that application.

problem is not that the petitioner sued prematurely or failed to sue within the prescribed period. The problem is that the Court of Appeals erred in terminating the petitioner's lawsuit under the Privacy Act, thereby arbitrarily precluding him from challenging the CSC's information and rating practices in the same litigation. 11/

11/ The petitioner denies that the final action of the Appeals Review Board ("Board") of the CSC was delayed by this litigation, as claimed by the respondents. When the appeal was pending six months the petitioner asked the Board about its status but did not receive a meaningful reply. Thereafter, he wrote to the Chairman of the CSC; and by letter dated April 12, 1977 (cited by the respondents), the Acting Chairman of the Board replied that the petitioner's files

> are in use by the General Counsel's Office as a result of your litigation. We understand the files can be returned to the Board in the next few weeks, at which time your appeal will be adjudicated.

Considering the ease of duplicating the record and that another full year passed until the appeal was adjudicated, the petitioner charges that there was no litigation delay, and that the Board simply refrained from acting on his appeal hoping that this litigation would somehow relieve it from deciding the hard rating practices issues which had been raised.

CONCLUSION

Since this reply brief is required to focus on the arguments first raised in the Brief in Opposition, its limited scope should not obscure the fact that this litigation under the Privacy Act involves issues affecting virtually every agency in the executive branch, and every person who is asked to provide information to the government or who is the subject of a government record. Those issues include the protection of confidential sources of information, the parallel rights (including the constitutional rights) of the subjects of the information obtained from confidential sources, and the responsibilities of government agencies under the Privacy Act with respect to such information.

Privacy is one of the foremost civil rights issues of current times. The Privacy Act of 1974 is the first enactment of Congress on the subject and has not yet been addressed by this Court. The petitioner respectfully requests the Court to

allow the writ for that reason, among others, to provide guidance to the lower courts and government agencies in the adjudication and administration of that statute.

Respectfully submitted,

ALAN J. WHITE
8201 Snug Hill Lane
Potomac, Md. 20854

Petitioner, in propria persona

UNITED STATES CIVIL SERVICE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20415

December 2, 1976

Alan J. White, Esq.
8201 Snug Hill Lane
Potomac, Maryland 20854

Dear Mr. White:

This has reference to your letter of August 16, 1976, to the Appeals Review Board concerning a review of the rating assigned to the application you filed under Announcement 318. Your letter was forwarded to this office in line with current procedures which provide for reconsideration of initial examination ratings. The record that has been reviewed includes the materials you submitted in support of your application, the information developed by the Commission and your letters, including your communication of October 22, 1976.

In evaluating your application for eligibility it was found that you had met the requirements of the Announcement having shown that you had acquired the necessary length, type and level of qualifying experience. The level of your experience as an attorney-adviser in the Federal Power Commission, as described in your application, was assigned 55 (out of a possible 60) and 50 points towards eligibility at the GS-15 and GS-16 grade levels, respectively.

In line with the examining and rating procedure followed in this program, information was then elicited from individuals having knowledge of your experience and professional qualifications; and an additional 18 points were added to the ratings mentioned above based upon a review of their

evaluations of the factors listed on page 4 of the Announcement.

Although your letter does not discuss the evaluation and rating of your experience, reconsideration shows that the numerical assignment made to your experience was in conformity with the standard adopted for this program and was correct.

In regard to the evaluations submitted to the Commission, your letter of October 22 discusses in detail the Form 192 [evaluation] submitted by the former Executive Director of the Federal Power Commission. You request that it be deleted along with certain other vouchers [evaluations] "presumably dated June 1, 1976" and "April 11, 1975".

In connection with the second part of the examining process, the evaluation and rating of professional qualifications of applicants, the Commission seeks to develope [sic.] sufficient information on the factors enumerated in the Announcement in order to assign a fair and reasonable score to an application. Accordingly, evaluations are secured from a number of individuals having personal knowledge of the applicant's experience and qualifications. Evaluations are elicited from agency officials, supervisory personnel, Administrative Law Judges, agency associates and other attorneys. In evaluating the responses in order to arrive at a proper numerical rating or score, consideration is given to the position of the respondent and the nature of the contacts had with the applicant, the frequency of the association, its recency, etc. Greater or lesser weight may be assigned to particular responses in the light of the foregoing factors.

Concerning the three requests in your October 22 letter, this office is unaware of any basis for deleting or expunging particular evaluations from an official record. However, as indicated above, the weight or consideration accorded a specific response may vary. And, in the light of an association which was limited in time, somewhat distant and infrequent and in consideration of the comments contained in an [sic., and] annexed to your October 22 letter, this office has discounted to a great extent the comments and has assigned minimal weight to the checkmarks contained in the Form 192 dated June 1, 1976, which you challenge.

Nevertheless, based on a careful review of all of the remaining Forms 192 in the record, it is the opinion of this office that the scoring of your qualifications and the final assigned rating were reasonable and proper. Accordingly, a change in the determination in the letter of August 13, 1976, cannot be made.

An appeal from this determination may be made by letter directed to the Chairman of the Appeals Review Board. In order to be timely the appeal should be filed no later than 30 days after your receipt of this letter.

Sincerely yours,

/s/ Charles J. Dullea

Charles J. Dullea
Director